72-1136

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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

No. 72-1136

MICHAEL J. WEATHERFORD, DANIEL LEON WEATHERFORD AND RAYMOND EUGENE HARVEY,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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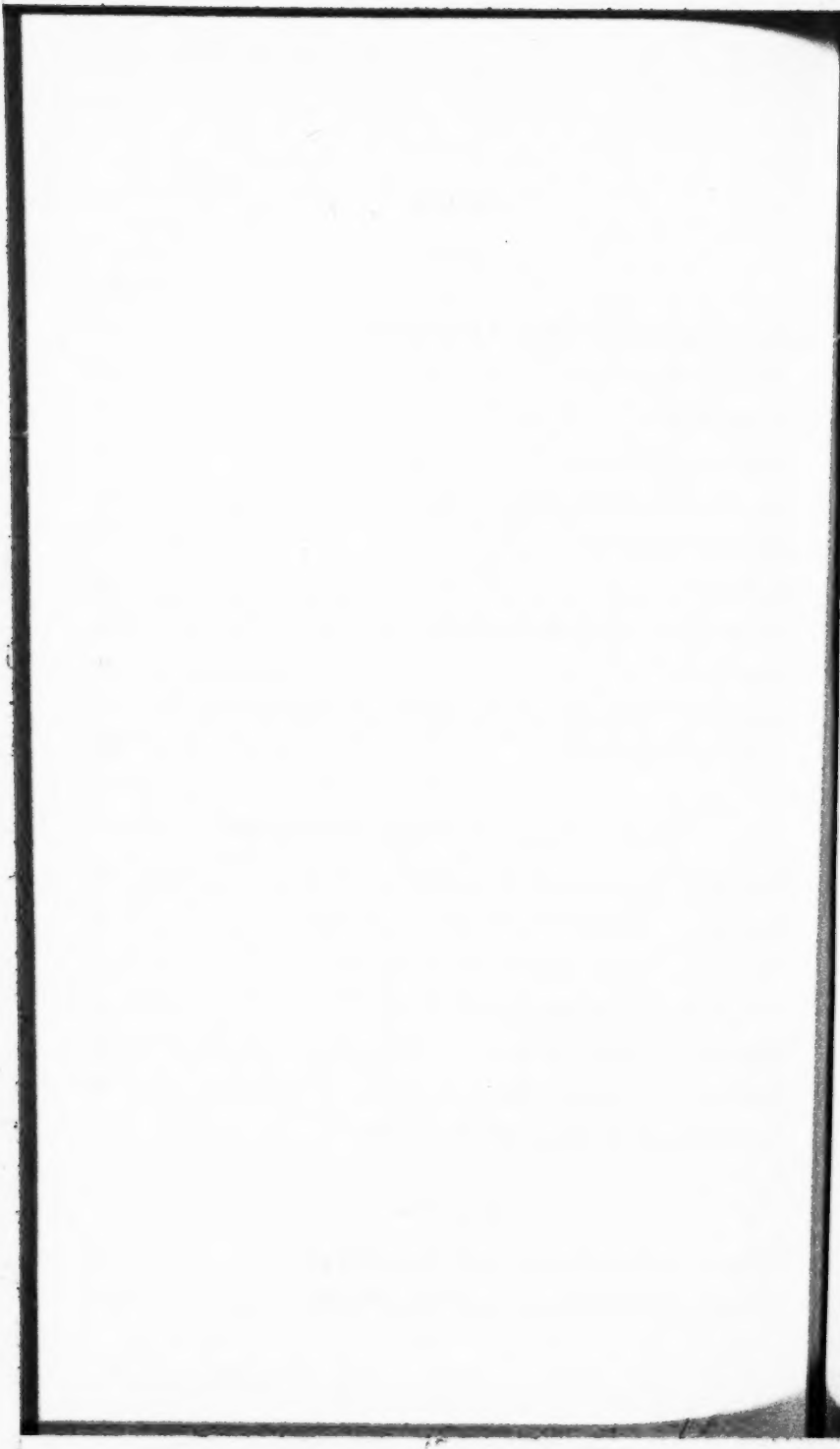

IN THE

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No. .....

MICHAEL J. WEATHERFORD, DANIEL LEON WEATHERFORD AND RAYMOND EUGENE HARVEY,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioners, Michael J. Weatherford, Daniel Leon Weatherford and Raymond Eugene Harvey, respectfully pray that a writ certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on December 19, 1972, affirming a judgment of conviction of petitioners previously entered in the United States District Court for the Northern District of Illinois.

OPINIONS BELOW.

There was no opinion in the District Court and its judgment is not reported. The opinion of the United States Court of Appeals for the Seventh Circuit has not yet been officially reported but has been reproduced in the appendix.

JURISDICTION.

The judgment of the U. S. Court of Appeals for the Seventh Circuit affirming the judgments of convictions and sentences imposed by the District Court was entered on December 19, 1972. Timely Petition for Rehearing was filed and denied by the Court of Appeals on January 17, 1973. The jurisdiction of this Court is invoked pursuant to the provisions of Title 28 U. S. Code, Section 1245(1).

QUESTIONS PRESENTED.

1. Does the Fourth Amendment require the suppression of evidence seized in the warrantless search of petitioners' vehicle?

2. Is Title 18, United States Code, Sec. 922(g) unconstitutional on the ground that its classification of citizens, against whom its proscriptions apply, violates the due process clause of the Fifth Amendment?

CONSTITUTIONAL PROVISIONS.

1. The Fourth Amendment to the Constitution of the United States.

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2. The Fifth Amendment to the Constitution of the United States.

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment

or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATUTES INVOLVED.

1. Title 18, U. S. C. Sec. 922(g)

"(g) It shall be unlawful for any person—

(1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year; . . .

to ship or transport any firearm or ammunition in interstate or foreign commerce."

2. Title 18, U. S. C. Sec. 921

"(20) The term 'crime punishable by imprisonment for a term exceeding one year' shall not include (A) any Federal or State offense pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices as the Secretary may by regulation designate, or (B) any State offense (other than one involving firearm or explosive) classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less."

STATEMENT.

Petitioners were indicted by the Grand Jury of the District Court for violating Title 18 U. S. C., § 922(g)(1) in connection with their transportation of firearms and ammunition from Indiana to Illinois on October 29, 1970. There is no question that each of Petitioners had previ-

ously been convicted in state courts in Indiana of felonies within the scope of the statute. A motion to suppress based on Fourth Amendment grounds was filed by each petitioner and denied in each instance by the District Court after hearing. A joint jury trial followed, resulting in a verdict of guilty against each of petitioners on which the District Court imposed a sentence of two and one half years in prison upon each of petitioners under each count of the indictment, said sentences to run concurrently with each other. Appeal to the Court of Appeals for the Seventh Circuit resulted in that court's judgment of December 19, 1972 affirming judgments of conviction with an opinion *per* Senior Circuit Judge Kilkenny. Timely petition for rehearing was denied.

In general, the statement of the facts of the incident of October 29, 1970 contained on page 2 of the opinion of the Court of Appeals under the heading "Background" is sufficient for purposes of this petition. Briefly, an off-duty deputy sheriff observed petitioners in a sporting goods store in West Lafayette, Indiana in the company of one Kenneth Burnett. He heard one of the four men—possibly one of petitioners, possibly Kenneth Burnett—order some ammunition. The deputy reported what he had heard and seen to his superiors from a telephone in a West Lafayette service station, along with the information that petitioners and Burnett were driving a blue panel truck. As a result of that intelligence, surveillance of the four men was instituted, the truck was followed from West Lafayette to the Illinois border 100 miles away, and a roadblock was set up on the highway approximately one mile inside the State of Illinois. The projected hunting trip to South Dakota planned by petitioners and Burnett ended at the roadblock where the guns and ammunition were seized from the blue panel truck by the officers. It was that evidence petitioners sought to suppress and it was that evidence, admitted after their motion was denied, upon which these convictions are predicated.

REASONS FOR GRANTING THE WRIT.

1. The constitutionality of the search under the Fourth Amendment.

The opinion of the Court of Appeals relies upon the moving vehicle doctrine first announced by this Court in *Carroll* v. *United States,* 267 U. S. 132, and expanded in *Brinegar* v. *United States,* 338 U. S. 160, and *Chambers* v. *Maroney,* 399 U. S. 42, to support the warrantless search of petitioners' vehicle, the seizure of the guns and ammunition therefrom, and the arrest of petitioners for violation of Section 922. Fundamental to our contentions here is, we believe, the need for this Court to examine the application of the *Carroll* doctrine to this case and cases like it. The point is simply that nothing in *Carroll* nor any of its progeny has eliminated the need for policemen to demonstrate probable cause in order to support the search of a vehicle.

What the *Carroll* doctrine does accomplish is the elimination of the requirements that officers present their probable cause to a disinterested magistrate and obtain a search warrant prior to conducting a search of a moving vehicle on the highway thought to contain contraband or evidence of the commission of a crime. The basis of the doctrine—indeed, the very reason for its existence—lies in the necessity for speedy action, if any action at all is to be taken. Moving vehicles on the highway, we concede, cannot be expected to remain long in one place; if they are to be searched and evidence is to be seized therefrom, the need for immediate police response is beyond cavil. In short, we do not here contest the firmly established doctrine of the *Carroll* case.

The appropriate ambit of that doctrine, however, is sorely in need of redefinition by this Court. No more illustrative

example could be postulated than that appearing in this record.

The deputy's information, according to his testimony at the hearing upon motion to suppress (T. 26 *et seq.*), was simply that one of the four individuals, he did not know who, ordered some ammunition in a sporting goods store. Had that ammunition and the firearms with which to use it been purchased, possessed and transported by Kenneth Burnett, no violation of Sec. 922 or any other law would have been involved in the entire episode. Burnett had no prior criminal record and was entitled to go on a hunting trip to South Dakota, carrying his own equipment with him. At the time of the search and the seizure, none of the officers had any indication that the siuation with which they were confronted was otherwise. There was no information available to any of the officers that petitioners, as opposed to Burnett, were transporting guns or ammunition. Even if they were certain that a hunting trip was in prospect, that one of the four had ordered ammunition, and that a firearm with which to use the ammunition was present, there was no probable cause to believe that the statute was violated when the panel truck crossed from Indiana to Illinois.

Nothing occurred to indicate the ownership of the guns and ammunition as between the four individuals involved until after the truck had been stopped, the men had been arrested, and the guns and ammunition had been seized. We refer to the language of Mr. Justice Jackson in *Johnson* v. *United States* in an analogous situation:

> "Thus the government is obliged to justify the arrest by the search and at the same time to justify the search by the arrest. This will not do." 333 U. S. 10, 16.

Probable cause to believe that an offense, including its most essential element, was committed, cannot be spelled out by

the very evidence obtained as a result of the search now based on the same probable cause. That kind of a circular approach is capable of utilization to emasculate the constitutional imperative of the Fourth Amendment in virtually every instance in which it ought rightly to be applied. We suggest that this Court, to delineate the scope of the *Carroll* doctrine, to insist on its essential component of probable cause, and to define probable cause in terms of information available to officers prior to the search, ought to grant the writ of certiorari to review the Fourth Amendment issue in this case.

2. The constitutionality of the statute under the Fifth Amendment.

The second major constitutional concern supporting the grant of a writ of certiorari in this case involves the constitutionality of the distinctions between citizens drawn by the statute in question considered with its definition section, 18 U. S. C. 921(20). Most recently, in *United States* v. *Bass*, 404 U. S. 336, this Court reserved decision on that very question in connection with a related portion of this same statute. At 404 U. S. 339, footnote 4 Mr. Justice Marshall for the Court stated:

> "The question whether the definition of 'felony' in Sec. 1202(c)(2) creates a classification violating the Fifth Amendment was not raised in the Government's Petition for Certiorari, and is also not considered here."

This case presents that very problem. Since *Bolling* v. *Sharpe*, 347 U. S. 497, there can be no question that the due process clause of the Fifth Amendment is at least as restrictive on the limits of federal legislation as the equal protection clause of the Fourteenth Amendment is upon the states. Accordingly, if the classifications adopted in the draftsmanship of the instant statute deny equal pro-

tection, they deny due process as well. The very opinion of the Court of Appeals demonstrates the denial:

> "Their [Petitioners'] constitutional challenge is grounded on the alleged wide disparity between the States on the severity of punishment for essentially the same criminal act. For example, they mention:
>
> (1) The theft of $150.00 in New York is a misdemeanor, while it is a felony in Louisiana, (2) the same crime is a misdemeanor in North Carolina but a felony in New Mexico and Indiana, (3) in Illinois the same criminal activity is a misdemeanor while in Indiana, it is a felony." Sl. Op. 6

That demonstration of the disparity and the resultant inequitable and unequal impact of this statute is not complete. It could be supplemented with vast numbers of additional examples of instances in which individuals, whose conduct is identical, are subject or not to the provisions of the act, depending upon geography or upon other vagaries of the law enforcement systems of the several States. The catalog of inequities and inequalities could be set forth at least to the length of a similar catalog relied upon by Mr. Justice Douglas for the Court in *Skinner* v. *Oklahoma*, 316 U. S. 535, to invalidate the Oklahoma sterilization statute as a denial of equal protection. Precisely the same criteria are involved here as were involved in *Skinner*, and this statute has precisely the same constitutional infirmity.

That fundamental unresolved question is involved in the consideration of the constitutionality of countless statutes involving restrictions upon criminal recidivists. It ought to be resolved by this Court. This case presents the question; it is ripe for resolution.

We, therefore, submit that a writ of certiorari ought to issue to review the judgments in the instant case.

CONCLUSION.

For the reasons stated above, petitioners respectfully pray that this court issue its writ of certiorari for the Seventh Circuit.

Respectfully submitted,

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Feburary, 1973.

APPENDIX.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

September Term, 1972 — October Session, 1972

Nos. 72-1080, 72-1081, 72-1082

UNITED STATES OF AMERICA,
Appellee,

vs.

MICHAEL J. WEATHERFORD, DANIEL L. WEATHERFORD and RAYMOND EUGENE HARVEY,
Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 71 CR 784

BERNARD M. DECKER,
Judge.

Argued October 26, 1972 — Decided December 19, 1972

Before: CASTLE, FAIRCHILD and KILKENNY,* *Circuit Judges.*

KILKENNY, *Circuit Judge*:

Appellants were indicted, tried by a jury and convicted of violating 18 U. S. C. § 922(g)(1), which prohibits the transportation of firearms or ammunition in interstate commerce by persons who have been convicted of a crime punishable by imprisonment for a term exceeding one year. Prior to the commission of the offenses here under

* Senior Circuit Judge John F. Kilkenny of the Ninth Circuit, sitting by designation.

scrutiny, each of the appellants had been convicted in the state courts in Indiana of at least one felony falling within the purview of the statute.

BACKGROUND.

On the morning of October 29, 1970, in West Lafayette, Indiana, a deputy sheriff observed appellants in Trader Horn's, a sporting goods store dealing in, among other things, guns and ammunition. After appellants, and a companion, entered the store, the officer heard one of them order some ammunition. He did not know who gave the order. Shortly thereafter, he observed the group in a gasoline service station in the blue panel truck in which they were subsequently arrested. Knowing that appellants were convicted felons, the officer called his superior at headquarters and reported these observations. Following through on this information and information that appellants were planning a hunting trip to South Dakota, three officers looked for, soon located and then placed under surveillance the blue panel observed by the first officer at the gasoline station. Attached to the vehicle was a U-Haul trailer. Leaving West Lafayette, the appellants drove the vehicle and trailer approximately 100 miles to the Indiana-Illinois border.* Except for one stop light, the vehicle did not stop nor did appellants leave it once it left West Lafayette. Approximately one mile west of the border the federal, and other, officers had set up a road block and there stopped the vehicle. Two of appellants were in the front seat. Two others emerged from the body of the panel, through the door opened by the police. Upon being informed that the police had reason to believe that they were transporting guns, appellant Michael Weatherford said: "The guns are in the truck, but they are not mine." The

* Appellant Harvey was driving.

door of the van was left open when he and the fourth man emerged. Shortly thereafter, Officer Dygrych, the Supervisor of the Alcohol, Tobacco and Firearms Division of the United States Treasury Department, observed five rifles and a handgun through the open door of the panel. Appellants' motion to suppress was denied. At the time of the trial, three of the rifles and one of the handguns and the ammunition purchased at Trader Horn's were admitted in evidence.

CONTENTIONS.

We respond to appellants' contentions in the order set forth in their brief.

(I) First, appellants argue that there was no probable cause for stopping the vehicle. We disagree. The question presented is whether the arresting officers, in the exercise of their expertise, had reasonably trustworthy information sufficient to warrant a reasonable belief that appellants were committing a crime and that evidence of the crime was in the vehicle. *Brinegar* v. *United States*, 338 U. S. 160 (1949). The officers knew that appellants were convicted felons and that at least one of the group had ordered ammunition for firearms from the clerk of the sporting goods store. The officers knew that appellants had stopped at a gasoline station, presumably for gasoline and that appellants were transporting at least ammunition, and were probably transporting guns. As emphasized by the trial judge, you wouldn't ordinarily order ammunition if you didn't have a gun with which to use it. Beyond that, the officers had more than a suspicion that the group was going on a hunting trip to South Dakota. To a good police officer that would indicate that more than one gun was probably involved. On the totality of circumstances, we hold that the officers had probable cause to stop the vehicle. The authorities cited by appellants do not fit our factual background.

(II) Appellants' Points (2) [were the guns seized incident to a lawful arrest], (3) [were the guns in plain view], and (4) [was the seizure valid under the moving vehicle exception] are so interrelated that they must be treated together.

Coolidge v. *New Hampshire,* 403 U. S. 443 (1971), emphasized by appellants, recognizes the well established rule that contraband illegally transported in an automobile or vehicle may be searched for, without a warrant, provided that the seizing officer has reasonable or probable cause for believing that the vehicle which he stops has contraband therein, which is being illegally transported. *Coolidge, supra,* p. 458, quoting from *Carroll* v. *United States,* 267 U. S. 132, 153-156 (1925). Here, as distinguished from *Preston* v. *United States,* 376 U. S. 364 (1964), the search of the vehicle was made at the place where the vehicle was stopped and in the presence of the appellants. The officers, knowing that appellants were previously convicted felons, and having probable cause to believe that appellants were transporting guns and ammunition, had a right to stop and search the vehicle for contraband. This rule was recognized as early as *Carroll* v. *United States, supra.* The right to search and the validity of the seizure in such case is not dependent upon the right to arrest. This right is dependent on the reasonable belief of the seizing officers that the contents of the automobile offend against the law. The *Carroll* doctrine was recognized and approved as recently as *Chambers* v. *Maroney,* 399 U. S. 42 (1970), where it is said, "In terms of the circumstances justifying a warrantless search, the Court has long distinguished between an automobile and a home or office." *Chambers,* p. 48. *Cooper* v. *California,* 386 U. S. 58, 59 (1967), recognizes the same principle, as does *Dyke* v. *Taylor Implement Mfg. Co.,* 391 U. S. 216, 221 (1968). There is nothing in *Chimel* v. *California,* 395 U. S. 752

(1969), purporting to modify or in any way affect the rationale of *Carroll*. For that matter, the *Chimel* court recognized the principles stated in *Carroll* and *Brinegar*. See 395 U. S. 752, 764, n. 9. We need not pass on whether the guns were seized incident to a lawful arrest or whether the guns were in plain view. We hold that there was a valid seizure of the guns and ammunition under the moving vehicle rule first recognized in *Carroll*. On the record before us, even the vehicle itself, was subject to seizure and forfeiture. 49 U. S. C. § 781 (a) (b) (2), 49 U. S. C. § 782. *United States* v. *Edge*, 444 F. 2d 1372, 1375 (CA 7 1971), *cert. denied* 404 U. S. 855 (1971). In *Coolidge*, the vehicle had not been moved for over a week and did not fall within the *Carroll* doctrine.

(III) Next, appellants argue that the officers had adequate time in which to apply for and secure a search warrant. Their argument is necessarily based on what the officers *knew* after appellants had crossed the state line, rather than the circumstances known to the officers prior to such crossing. Prior to the actual crossing, 18 U. S. C. § 922 (g) (1), had not been violated by appellants. While the officers knew that appellants had ordered ammunition and were probably transporting guns and ammunition in the panel truck and had cause to believe that appellants might intend to cross the state line on Highway 80, there is nothing in the record to show they had sufficient information on the subject of crossing the state line to justify asking for a warrant in the Northern District of Indiana under Rule 41, FRCrimP. Under the provisions of Rule 41, the application for a warrant must be issued within the District where the property is located. The officers could not say that the guns and ammunition were located in Illinois until after the crossing. Although their initial information was received some three hours prior to the crossing, it was the surveillance of the moving

vehicle during the ensuing three hour period and the crossing of the border which led to the probable cause for stopping and searching the vehicle. We hold that the officers could not foresee with any degree of probability that appellants would actually cross the Illinois state line. This case, although distinguishable on the facts, can be likened to and compared with *Chambers* v. *Maroney, supra,* where the Court said:

> "Arguably, because of the preference for a magistrate's judgment, only the immobilization of the car should be permitted until a search warrant is obtained; arguably, only the 'lesser' intrusion is permissible until the magistrate authorizes the 'greater'. But which is the 'greater' and which the 'lesser' intrusion is itself a debatable question and the answer may depend on a variety of circumstances. For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment." [399 U. S. at pp. 51-52].

Under the facts of this case, it would place an intolerable burden on police officers to require them to obtain a search warrant before stopping the vehicle. Neither *Preston* v. *United States, supra,* nor *Dyke* v. *Taylor Implement Mfg. Co., supra,* support appellants' argument.

(IV) Finally, appellants challenge the constitutionality of 18 U. S. C. § 922 (g) on the ground that it creates an illegal classification of citizens in violation of the Fifth Amendment.

Conceding that *United States* v. *Bass,* 404 U. S. 336 (1971) upholds the constitutionality of certain segments of the legislation, appellants point to the language of the majority opinion which by-passes the issue here pre-

sented for the reason that it had not been properly raised.[1] Relying upon *Shapiro* v. *Thompson,* 394 U. S. 618 (1969); *Gillette* v. *United States,* 401 U. S. 437 (1971); *Bolling* v. *Sharp,* 347 U. S. 497 (1954); *United States* v. *Holmes,* 387 F. 2d 781 (CA 7 1968), *cert. denied* 391 U. S. 936, and similar authorities, appellants argue that the statute under which the indictment was drawn is unconstitutional for the reason that it creates unreasonable classifications which tend to discriminate against persons because of the state in which they live. Their constitutional challenge is grounded on the alleged wide disparity between the states on the severity of punishment for essentially the same criminal act. For examples, they mention: (1) the theft of $150.00 in New York is a misdemeanor, while it is a felony in Louisiana, (2) the same crime is a misdemeanor in North Carolina, but a felony in New Mexico and Indiana, (3) in Illinois the same criminal activity is a misdemeanor, while in Indiana it is a felony.

At the outset, appellants are faced with the rule that the Congress has the right to regulate and exclude from interstate commerce articles, the use of which in the states for which they are destined, may be injurious to the public health, morals and welfare of that state. *United States* v. *Carolene Products Co.,* 304 U. S. 144, 147 (1938). Additionally, the Congress has great latitude in making statutory classifications in social and economic legislation. A statutory discrimination will not be set aside as violative of equal protection or due process if any state of facts reasonably may be conceived to justify it. *Levy* v. *Louisiana,* 391 U. S. 68, 71 (1968); *Williamson* v. *Lee Optical Co.,* 348 U. S. 483, 489 (1955).

It seems crystal clear that the purpose of Congress in enacting this legislation was to eliminate firearms from the hands of criminals, while interfering as little as possible

1. 404 U. S. 339.

with the law abiding citizen. The initial legislation, enacted in 1938, being inadequate to stop the infiltration of racketeering into society, the Congress decided to better assist local authorities in their common assault against crime by passing in 1961 an act to strengthen the Federal Firearms Act.[2] By this Act, the initial legislation was amended so as to delete the words "crime of violence" and substitute therefore the words "crime punishable by imprisonment for a term exceeding one year." The Senate Report made it clear that the amendment was added to ". . . make it more difficult for the criminal elements of our society to obtain firearms."

It is our belief that the classification created by this legislation is both reasonable and practical. The 1965 legislation[3] Concerning the same subject, made it possible for those who could show that their past record was comparatively innocuous to gain exclusion from the Act. Appellants did not seek the benefit of this legislation. In our opinion, there is no fundamental right to transport weapons and ammunition in interstate commerce. Manifestly, there is no basic civil right to transport weapons such as there is to exercise a voting privilege.

We have no difficulty in holding that the section under consideration is not constitutionally infirm as a denial of equal protection to appellants under the Fifth Amendment. *United States* v. *Giannini*, 455 F. 2d 147 (CA 9, 1972); *Stevens* v. *United States*, 440 F. 2d 144 (CA 6, 1971); *United States* v. *Synnes*, 438 F. 2d 764 (CA 8, 1971);[4] *United States* v. *Karnes*, 437 F. 2d 284, 287 (CA 9, 1971), *cert. denied* 402 U. S. 1008, and *United States* v. *Thoresen*, 428 F. 2d 654 (CA 9, 1970), support this view.

2. 75 Stat. 757.
3. 79 Stat. 788.
4. Vacated on other point, 404 U. S. 1009 (1972).

Appellants other arguments on the constitutionality of the legislation[5] have received our consideration and we find them without merit. *United States* v. *Karnes, supra; United States* v. *Thoresen, supra.*

The judgment appealed from is AFFIRMED.

5. (1) That the statute is constitutionally over-broad by including felons whose prior crimes do not involve firearms or violence.

(2) That the statute's exclusion of certain misdemeanors and business regulation convictions render it unconstitutional for too narrowly defining the class of application, and

(3) That the statute's reliance on the state's definition of felonies and misdemeanors denies the appellants their Fifth Amendment rights.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

December 19, 1972

Before

Hon. LATHAM CASTLE, *Senior Circuit Judge.*
Hon. THOMAS E. FAIRCHILD, *Circuit Judge.*
Hon. JOHN F. KILKENNNY, *Senior Circuit Judge (Ninth).*

Nos. 72-1080, 72-1081 and 72-1082

UNITED STATES OF AMERICA,
Appellee,

vs.

MICHAEL J. WEATHERFORD, DANIEL L. WEATHERFORD and RAYMOND EUGENE HARVEY,
Appellants.

Appeal from the United States District Court for the Northern District of Illinois Eastern Division.

OPINION BY JUDGE KILKENNY.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
January 17, 1973

Before

Hon. LATHAM CASTLE, *Sr. Circuit Judge.*
Hon. THOMAS E. FAIRCHILD, *Circuit Judge.*
Hon. JOHN F. KILKENNY, *Sr. Circuit Judge.*

Nos. 72-1080, 1081, 1082

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

MICHAEL J. WEATHERFORD, DANIEL L. WEATHERFORD and RAYMOND EUGENE HARVEY,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois Eastern Division.

(71 CR 784)

On consideration of the petition for rehearing filed in the above-entitled cause,

IT IS ORDERED that said petition for rehearing be, and the same is hereby denied.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1136

MICHAEL J. WEATHERFORD,
DANIEL LEON WEATHERFORD
AND RAYMOND EUGENE HARVEY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners raise two issues: the lawfulness of the search of their truck for contraband firearms and the validity under the Due Process Clause of the prohibition in the Gun Control Act against interstate transportation of firearms by convicted felons.

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioners were convicted of transporting firearms in interstate commerce after conviction of a felony, in violation of 18 U.S.C. 922(g)(1)(C.T. 2, 21).[1] The court of appeals affirmed (Pet. App. A1-A10).

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[1] "C.T." refers to the clerk's transcript (containing the indictment, pleadings and orders). "Tr." refers to the reporter's transcript of the trial and pre-trial proceedings. Copies of the transcripts are on file in the Clerk's office.

In challenging the search of their vehicle, which led to the seizure of various firearms, petitioners claim only that the officers lacked probable cause to stop their panel truck (Pet. 5-7). This claim is fully considered and properly answered in the opinion of the court below, on which we rely (Pet. App. A3).

Petitioners' contention that 18 U.S.C. 922(g)(1) denies due process (Pet. 7-8) is based on their claim that the class of persons the statute prohibits from transporting firearms--those who have been convicted of a crime punishable by imprisonment for a term exceeding a year--is arbitrary and unreasonable. The argument is that as a consequence of the disparities among the criminal laws of the several jurisdictions of the country (state and federal) conviction for a particular crime--*e.g.*, the theft of $150--might or might not make one subject to the Section's strictures, depending on the penalty assigned for the offense by the particular jurisdiction. While we rely on the court of appeals' answer to this contention (Pet. App. A6-A8),[2] we further point out that there is no

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[2] See, in addition to the decisions cited at Pet. App. A8, *Cases* v. *United States*, 131 F. 2d 916, 924 (C.A. 1), certiorari denied *sub nom. Velazquez* v. *United States*, 319 U.S. 770.

Skinner v. *Oklahoma*, 316 U.S. 535, relied on by petitioners, is not in point. In invalidating Oklahoma's Habitual Criminal Sterilization Act as violative of the Equal Protection Clause, the Court there noted among other things that under the Act one thrice convicted of stealing property valued at more than $20 was liable to sterilization, whereas an embezzler was immune from the Act's penalties no matter how large his defalcations or how numerous his convictions (316 U.S. at 538-539). Nothing comparable is involved here. As the court of appeals pointed out, the classification of persons to whom Section 922(g)(1) applies is as "reasonable and practical" as the nature of such legislation permits (Pet. App. A8). In addition, the legislation with which *Skinner* was concerned dealt with "one of the basic civil rights of man" (316 U.S. at 541)--

suggestion in the petition that the convictions that caused petitioners to be subject to the Section were of the sort to which their contention would apply.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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the right to procreate. "Manifestly," on the other hand, as the court below noted, "there is no basic civil right to transport weapons * * *" (Pet. App. A8).

[3] The convictions were Indiana convictions for second degree burglary (defined by Indiana law as breaking and entering a structure other than a dwelling house—or any of certain specified types of crafts and vehicles—with intent to commit a felony therein), the prescribed penalty for which is not less than two nor more than five years' imprisonment (Burns Ann. Ind. Stat. (1956), §10-701(b)). Petitioner Harvey had in addition been convicted of the separately defined Indiana offense known as entering to commit a felony, the punishment for which is not less than one nor more than ten years' imprisonment (*id.*, §10-704) (C.T. 2; Tr. 133-145).